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No. 96-436

In The

Supreme Court of the United States

October Term, 1996

IN RE MARRIAGE OF: MARTIN MEYER WEISS,

Petitioner,

vs.

MARSHA NADEEN WEISS,

Respondent.

On Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

REHWALD RAMESON LEWIS & GLASNER
THOMAS TRENT LEWIS,
State Bar #82311
CELESTE ELAINE KIRK
State Bar #181699
5855 Topanga Canyon Blvd.
Suite 400
Woodland Hills, California 91367
(818) 703-7500
Facsimile (818) 703-7498

Attorney for Respondent
Marsha Nadeen Weiss

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Marsha Weiss, respectfully opposes Martin Weiss' petition for a Writ of Certiorari to review the order of the California Court of Appeal, Second Appellate District, Division Three.

OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division Three, denied Petitioner's Writ in its entirety. The California Supreme Court denied Petitioners' request for review.

1. Interlocutory Order Granting Respondent's Motion for Pendente Lite Contributory Attorney's Fees, entered by the Superior Court of the County of Los Angeles, Northwest District, Case Number NWD 119 894, on July 29, 1991.

2. Interlocutory Order Granting Respondent's Motion for Additional Pendente Lite Contributory Attorney's Fees, entered by the Superior Court of the County of Los Angeles, Northwest District, Case Number NWD 119 894, on November 5, 1992.

3. Judgment on Issue of Custody, entered by the Superior Court of the County of Los Angeles, Northwest District, Case Number NWD 119 894, on August 4, 1993.

4. Petition for Review in the Supreme Court of the State of California Denied, Case Number B083168, May 1, 1996.

JURISDICTION

Petitioner seeks review of the actions of the Court of Appeal of the State of California, Second Appellate District, Division Three. The Court of Appeal entered its opinion on January 31, 1996. The Supreme Court of the State of California denied Petition for Review on May 1, 1996. Petitioner has exhausted all remedies below.

STATEMENT OF THE CASE

Petitioner, Martin Weiss, (Martin), appeals the trial court's Further Judgment on the Reserved Issue of Custody, as well as the trial court's two contributory fee awards in favor of Respondent, Marsha Weiss, (Marsha).

During their marriage, Martin and Marsha practiced the same faith; However, the parties now practice different faiths. Notwithstanding Martin's contention that Marsha had signed a religious upbringing agreement, and should therefore be enjoined from violating the agreement, the trial court denied Martin's request to restrain Marsha from involving the minor child, Matthew Weiss, (Matthew), in religious activities with an orientation other than Judaism; Additionally, the trial court made two contributory fee award orders, payable by Martin to Marsha totalling $22,000.

The two main issues which were before the Appellate Court, and which are now before this Court are whether the trial court properly denied Martin's request to restrain Marsha from engaging Matthew in religious

activities, and whether the trial court's contributory fee awards were properly made.

PROCEEDINGS BELOW

Martin and Marsha were married in 1984, shortly after Marsha converted to Judaism. There is one issue of the marriage, Matthew, who was born in 1985. In December, 1989, Martin filed a Petition for Dissolution of Marriage. In July, 1991, the trial court ordered Martin to pay Marsha $10,000 in contributory attorney's fees.

The trial court previously bifurcated the matter on the issue of custody. Trial on the issue of custody commenced on August, 25, 1992, after a full custody evaluation had been performed by a court-appointed Psychologist, and continued for three days. In November, 1992, the trial court made an additional award of contributory attorney's fees to Marsha in the amount of $12,000.

In August, 1993, the trial court entered its Further Judgment on the Reserved Issue of Custody, awarding the parties joint legal and physical custody of Matthew, and ruling that neither party would be restrained from engaging in religious activities with Matthew, or allowing Matthew to be involved with religious activities. Further, the court ordered that Martin could enroll Matthew in a Hebrew Jewish Studies program and that this extracurricular activity would take precedence over others.

In October, 1993, Martin filed an appeal of the trial court's two previous contributory attorney's fees award orders, as well as the trial court's Further Judgment on

the Reserved Issue of Custody. The Second District Court of Appeal affirmed the trial court ruling in a published order on January 31, 1996. Subsequently, in March, 1996, Martin filed a Petition for Review in the Supreme Court of the State of California, which was denied. Martin has now filed a Petition for a Writ of Certiorari in the Supreme Court of the United States of America.

REASONS FOR DENYING THE WRIT

1. **The trial court's award of contributory attorney's fees to Marsha was wholly consistent with the Legislative intent behind California Family Code Section 2030, which is to provide one party, if necessary, with an amount of money adequate to properly litigate controversy, thereby "levelling the playing field" between spouses with disparate incomes.**

As is evidenced by his argument regarding contributory attorney's fee awards in his Petition for Review, Martin either refuses to recognize or genuinely does not grasp the legitimate need for or the Legislative intent behind contributory fee awards to the lesser income-earning spouse in a Dissolution of Marriage proceeding.

The purpose of a California Family Code Section 2030 fee award is to ensure that a party has adequate resources to properly litigate the controversy and to implement public policy favoring a "parity between spouses in their ability to obtain legal representation" (thus equalizing litigation strength). [Cal. Fam. Code Sections 2030 (a), 2032; in *In Re Marriage of Sullivan* (1984) 37 Cal. 3d 762, 768, 209 Cal. Rptr. 354, 357; in *In Re Marriage of Dick*

(1993) 15 Cal. App. 4th 144, 167, 18 Cal. Rptr. 2d 743, 756; in *In Re Marriage of Ward* (1992) 3 Cal. App. 4th 618, 623, 4 Cal. Rptr. 2d 365, 368; in *In Re Marriage of Green* (1989) 213 Cal. App. 3d 14, 261 Cal. Rptr. 294]. Section 2030 of the California Family Code provides for contributory attorney's fees awards based on "need" and "ability to pay." Further, under this same portion of the Code, contributory fee awards may issue only where "just and reasonable under the relative circumstances of the respective parties." [Cal. Fam. Code Section 2030(a), 2032; in *In Re Marriage of Dick*, supra, 15 Cal. App. 4th at 167, 18 Cal. Rptr. 2d at 756] Pursuant to Section 2030, gender is not a fact for consideration when the court makes these contributory fee awards.

The facts below show that the three days of litigation in the trial court were spent on the issue of "religious custody." This particular set of circumstances speaks *directly* to the need for and the reason behind contributory attorney's fee awards. The fee award against Martin is, in large part, what enabled Marsha to defend against Martin's attempt to violate her First Amendment right to raise Matthew with the religious orientation of her choice. At the trial court level, even prior to the enactment of the Religious Freedom Restoration Act, the applicable law as set forth in *In Re Marriage of Mentry* was clear. To enlist state intervention into religious upbringing issues, there must be a showing of "substantial likelihood of harm to the child." Notwithstanding Martin's woeful lack of evidence of such harm, Martin continued in his attempt to restrain Marsha from engaging Matthew in religious activities. It is especially these kind of unreasonable positions of litigants that require some sort of

assurance that adequate resources will be available to both parties.

While Martin has set forth an interesting policy argument regarding the evils of contributory attorney's fees, and surely may find himself in the sympathetic company of many an ex-spouse who has felt the sting of a contributory fee award being levied against him, his arguments that such an award is punitive, tantamount to a governmental taking, or a gender-based violation of the Equal Protection Clause, find no basis in Federal, Case, or Statutory Law.

2. Pursuant to California Family Code Section 2030, the trial court had broad discretion to award attorney's fees and costs to Marsha; In the absence of a clear showing of abuse, the trial court's order must not be disturbed on appeal.

California Family Code Section 2030 provides that "the court may make a pendente lite award for costs and attorney's fees reasonably necessary to conduct family law litigation."

As the court in *In Re Marriage of Lopez* (1974) 38 Cal. App. 3d, 93, 113, 113 Cal. Rptr. 58 noted, "Such an award of attorney's fees and costs is within the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal unless there is a clear showing of abuse."

The court in *In Re Marriage of Sullivan* (1984) 37 Cal.3d 771, 209 Cal. Rptr. 354, citing *In Re Marriage of Popenhager*, (1979) 99 Cal. App. 3d 514, 525, 160 Cal. Rptr. 379, stated "[I]n making its determination as to whether

or not attorney's fees and costs should be awarded, the trial court considers the respective needs and incomes of the parties." The *Sullivan* court went on to state that the trial court is not restricted in its assessment of ability to pay to a consideration of salary alone, but may consider all the evidence concerning the parties' incomes, assets, and abilities. *Meagher v. Meagher* (1961) 190 Cal. App. 2d 62, 64, 11 Cal. Rptr. 650. The trial court below, in following the above referenced guidelines, found the annual incomes of Martin and Marsha to be $137,000 and $6,720, respectively, and calculated reasonable fee awards based on those amounts. Simply, other than Martin's contentions, no substantial evidence has been presented which contraindicates the parties income levels, or tends to show that Martin in fact was not earning, or did not have the ability to earn at the above noted level, or that Marsha had a greater ability to earn than found by the trial court.

Again, Martin's real argument here is that the award of attorney's fees to Marsha prevented him from securing effective legal representation; However, as Martin states in his own Petition for Writ of Certiorari (p. 10), Martin's brother paid for legal representation for Martin. What Martin fails to understand is that the reason Martin's attorney refused to pursue Martin's goals with regard to the custody issue is not, as Martin purports, because the attorney did not agree with Martin's goals, but because Martin's attorney knew that there was no legal basis for pursuit of these goals, and that attempting to secure what Martin refers to as his "rights," (an example of which

according to Martin, would be to enforce the Religious Upbringing Agreement) would mean wasted time for the court and wasted financial resources for both Martin and Marsha.

3. Notwithstanding the trial court's fee award, Martin is unable to meet the "substantial likelihood of harm" showing as required by leading case law and statutory law; Pursuant to the Religious Freedom Restoration Act, Martin has an even greater requisite showing of harm.

Martin repeatedly makes the claim that the reason he was unable to make a requisite showing of "substantial likelihood of harm" is because he was denied effective legal representation when the court ordered him to pay contributory attorney's fees, (because the court's fee order left him without funds to finance his own litigation); However, it must be noted here that the presence or absence of what Martin considers to be effective legal counsel does not change the fact that there simply is no evidence of past, present, or future substantial harm to Matthew due to his dual religious upbringing.

Recently enacted Federal Law now preempts the field concerning the religious freedom issues raised in this appeal and earlier California case law. Section Three of the Religious Freedom Restoration Act (RFRA) mandates that the government: a) shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b); b) may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person 1) is in furtherance of a

compelling governmental interest, and 2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.A. Section 2000bb. In practical terms, this law permits religious citizens to exercise their religion as their conscience dictates. The government has no right to interfere, unless the religious exercise would threaten a compelling governmental interest.

The establishment of the RFRA and its compelling state interest standard has effectively preempted the standard of likely harm set forth in *In Re Marriage of Mentry* (1983) 142 Cal. App. 3d 260, 190 Cal. Rptr. 843, the leading California case on the court's intervention in religious upbringing. Accordingly, in deciding the case at bar, this court should look beyond the *Mentry* standard, and instead look to the standard created by the enactment of RFRA. Simply put, to the extent *Mentry* is inconsistent with the RFRA, this court should disapprove *Mentry* or clearly state that *Mentry* is still good law under the RFRA.

Under *Mentry*, in order for the court to justify intrusion into a family's privacy and its religious practices, there must be a clear affirmative showing that "the religious activities complained of would be harmful to the children." *Mentry*, 142 Cal. App. 3d 260, 263. RFRA has raised this standard by requiring a showing of a "compelling state interest" in order to justify intrusion. Additionally, RFRA has essentially erected a wall that precludes courts from delving into the subjective effects on children that occur when two divorced parents are in conflict over religious beliefs and religious upbringing.

The standard established by *Mentry* is a difficult standard to meet. The courts have made it clear that a showing of "confusion" is not sufficient to warrant government mandates on religious practices. Now, pursuant to RFRA's compelling state interest standard, the burden is even greater.

As Respondent urged at the Appellate Court level, RFRA establishes the below set forth 3-prong test for the analysis of a Religious Freedom issue such as the one before this Court. Accordingly, Respondent invites this Court to implement this test in considering the case at bar:

> **1) Is the appellant's right to Free Exercise of Religion being substantially burdened by the activity of another?**
>
> **2) If so, after balancing the clear affirmative showing of harm or burden against the First Amendment rights of the actor, is the level of harm being suffered by the appellant sufficient to trigger a compelling governmental interest and to thereby justify government intervention?**
>
> **3) If so, does the governmental intrusion constitute the least restrictive means possible, avoiding excessive governmental entanglement with religious issues?**

Clearly, the instant case does not survive beyond the first tier of the above analysis, as Martin bears no substantial burden on his Right to Free Exercise of Religion as a result of the lower court's refusal to enjoin Marsha from involving Matthew in religious activities; Notwithstanding, the Appellate Court's silence on the applicability of

RFRA in the present case, other than its succinct note that RFRA is consistent with *Mentry* was somewhat disappointing to Respondent, especially in light of the need for interpretation of RFRA. As set forth above, Respondent asserts that pursuant to RFRA, *Mentry* does not provide a sufficient requisite showing of harm, and that RFRA does indeed supersede Mentry's "substantial likelihood of harm" standard, raising that standard to one necessitating a compelling governmental interest.

CONCLUSION

Respondent urges this Court to deny Petitioner's Request for a Writ of Certiorari in its entirety. While Petitioner bases his request on novel and creative concepts, his arguments are simply not legally, nor even logically sound. The law is settled regarding the lower court's jurisdiction to award contributory attorney's fees to a spouse in a marital dissolution proceeding, and is founded on vital policy considerations; Further, Petitioner has presented no evidence that the trial court abused its discretion in making the fee orders. Finally, Petitioner's contention that the fee order effectively precluded him from securing competent legal counsel, thereby making it impossible for him to present evidence of the harm that was being suffered by Matthew, is nothing more than Petitioner's weak attempt at circumventing the established standard of "substantial likelihood of

harm" under case law, or compelling state interest under RFRA.

Respectfully submitted,

THOMAS TRENT LEWIS
Attorney for Respondent
REHWALD RAMESON LEWIS & GLASNER
5855 Topanga Canyon Blvd.
Suite 400
Woodland Hills, California 91367
(818) 703-7500
Facsimile (818) 703-7498

APPENDIX

A. California Family Code Section 2030 states:

(a) During the pendency of a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, upon (1) determining an ability to pay and (2) consideration of the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of the party's rights, order any party, except a governmental entity, to pay the amount reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding. From time to time and before entry of judgment, the court may augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded.

(b) Attorney's fees and costs within this section may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding.

(c) For services rendered or costs incurred after entry of judgment, the court may award the attorney's fees and costs reasonably necessary to maintain or defend any subsequent proceedings, and may augment or modify an award so made, including after an appeal has been concluded.

(d) Any order requiring a party who is not the spouse of another party to the proceeding to pay attorney's fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues related to that party.

B. California Family Code Section 2032 states:

(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

C. 42 U.S.C.A. Section 2000bb states:

a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b);

b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person

1) is in furtherance of a compelling governmental interest, and

2) is the least restrictive means of furthering that compelling governmental interest.